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ALEXANDER
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NO. 82-1663

In The
Supreme Court Of The United States

OCTOBER TERM, 1982

KARL FLEISCHMANN, TRUSTEE
Appellant

v.

WETHERSFIELD PLANNING AND ZONING COMMISSION ET AL
Appellees

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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EACH OF THE ARGUMENTS PRESENTED BY APPELLEE IN SUPPORT OF ITS MOTION TO DISMISS OR AFFIRM IS VITIATED BY A MISTAKE OF LAW OR BY A LAPSE IN LOGIC.

I. It suffices under *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n. 4 (1980) that Appellant has challenged below the constitutionality of application of a state statute.

The Appellees' first argument, urging that this Court lacks either appellate or certiorari jurisdiction, was prepared without regard to the law as stated by the Chief Justice in *Richmond Newspapers*. It is sufficient that there be an "explicit and timely insistence in the state courts that a state statute, *as applied*, is repugnant to the federal Constitution, treaties or laws." (emphasis added) *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n. 4 (1980). The jurisdictional statement demonstrates that such a claim was in fact made and indeed on page 7 of its Motion, Appellee admits as much. The Appellee's mistake lies in its failure to go beyond the bare language of 28 U.S.C. §1257 (2) and to reach into the case law.

II. It is logically circular to assert that a statute of limitations provides an adequate non-federal basis of decision in a case where the Appellant has challenged the constitutionality of application of that statute.

As appears from the record and the Jurisdictional Statement, Appellant has throughout this litigation asserted that the 15-day from publication limitation of §8-28 Conn. Gen. Stats. cannot be constitutionally applied to him. The gravamen of this case is that what purports to be a non-federal basis of decision runs afoul of the Constitution. Thus, the claim that the decision below rests

upon an adequate non-federal basis assumes that of which Appellee must convince this Court: that the statute was constitutionally applied.

An alternative demonstration of the fallacy of this claim lies in its absurd implication. If it were true that a state court decision purporting to rest upon a state statute were by that purport grounded upon an adequate non-federal basis, then this Court could never review a claim that a state statute had been unconstitutionally applied.

III. The Appellant's claim that controlling precedents of this Court were ignored raises a substantial federal question.

The Jurisdictional Statement argues that the Connecticut courts have ignored controlling precedents of this Court. The Appellee makes two responses:

1. It reiterates on pg. 13 of its Motion the claim that there is a distinction between pre-hearing and post-hearing notice. Appellant anticipated and refuted this argument in the Jurisdictional Statement, pg. 5 n. 2. Moreover, no court has ever addressed this argument, much less accepted it, and it is surely a substantial basis of appeal that precedents of this Court were ignored below.

2. The Appellee cites authority from Connecticut and assorted other states for the general propositions that due process is a flexible notion and that one who lacks a constitutional right to judicial review may not claim that it has been unconstitutionally denied him. Lower court authority is hardly persuasive to rebut Appellee's claim that due process, however flexible, requires notice in writing in this case under *Mullane* et al. Nor is lower court authority persuasive to rebut the proposition that once a state has acted to create a right, its beneficiaries cannot be denied it absent a procedure which complies with due process standards. *Goss v. Lopez* et al cited in the Jurisdictional Statement, pg. 10.

CONCLUSION

The Motion to Dismiss or Affirm lacks a basis in either law or logic. The Jurisdictional Statement sets forth grounds which are sufficient to warrant this Court to take jurisdiction, to summarily reverse the Connecticut Supreme Court's order denying certification, and to remand to that Court with direction to certify the case for review and to consider it in light of the principles enunciated by *Mullane* and *Schroeder* and their progeny.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Brief have this 13th day of May 1983 been served upon each of each of Sabatini and Budney, One Market Square, Newington, CT 06111 and Kotchen, Ripper and Goldstein, 2264 Silas Deane Highway, Rocky Hill, CT 06067 by U.S. Mail, First Class Postage Prepaid. The foregoing constitutes service upon all parties and persons required to be served under United States Supreme Court Rule 28, as the Connecticut Attorney General has notified the undersigned that he does not wish to "get directly involved in these proceedings."

/s/ Karl Fleischmann
Karl Fleischmann
Member of the Bar of the
United States Supreme Court